

## Second Circuit Declares Ad Rules Unconstitutional

BY ROY SIMON

On March 12, 2010, the Second Circuit finally handed down its decision in *Alexander v. Cahill*, 2010 WL 842711. The Second Circuit affirmed all but one aspect of the District Court's decision, thus agreeing that four of the six challenged provisions in New York's rules governing lawyer advertising were unconstitutional under the First Amendment— but also agreeing that a blanket ban on solicitation in any form within thirty days after an accident or disaster causing personal injury or death did *not* violate the First Amendment. This article briefly describes the Second Circuit's opinion, but the real focus is on the awkward rulemaking process in New York that led the Courts to adopt provisions held to be unconstitutional. We need to improve the rulemaking process in New York. I hope the Second Circuit's rebuke to the New York judges and disciplinary counsel who wrote and championed the unconstitutional rules will be the catalyst for a closer and more cooperative relationship between the Courts and the State Bar, and that the Courts will ultimately honor the State Bar's historical role as the principal drafter of proposed new rules.

### **Background: Before and After *Bates***

Like a center fielder chasing a fly ball to the warning track, we need to go way, way, way back to understand the significance of *Alexander v. Cahill*.

Before 1977, every American jurisdiction prohibited lawyer advertising – no Yellow Pages display ads or back covers, no newspaper ads, no radio or TV ads, no targeted letters to people who might need legal services. The basic philosophy was captured well in Canon 27 of the old ABA Canons of Professional Ethics, which dated back to 1908. It said, in part:

#### *27. Advertising, Direct or Indirect*

It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible ....

The ABA Model Code of Professional Responsibility continued the same prohibitions in DR 2-101, though in less flowery language, and virtually every state adopted it. For example, Arizona DR 2-101 provided as follows:

(B) A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or

television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

The world changed radically when the Supreme Court decided *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), which extended First Amendment protection to lawyer advertising for the first time and therefore invalidated Arizona's blanket ban on advertising "routine" prices for legal services. In the next dozen years, the Supreme Court issued a steady drumbeat of cases that significantly expanded the right of lawyers to advertise their services and solicit clients – *In re Primus*, 436 U.S. 412 (1978) (permitting lawyer for non-profit organization to solicit *pro bono* clients); *In re R.M.J.*, 455 U.S. 191 (1982) (permitting lawyer to send announcements to nonclients and to advertise practice areas not on state's approved list); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985) (permitting newspaper advertisements targeted at Dalkon Shield victims, illustrations of the device, and legal advice about statutes of limitations); *Shapiro v. Kentucky Bar Association*, 486 U.S. 466 (1988) (permitting targeted letters to people whose homes were in foreclosure); *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990) (permitting a lawyer to state that he was a "Certified Civil Trial Specialist By the National Board of Trial Advocacy"); *Ibanez v. Florida Department of Business and Professional Regulation*, 512 U.S. 136 (1994) (permitting a lawyer to state on her letterhead that she was certified by a private organization as a Certified Financial Planner or "CFP").

Only two cases – *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (upholding state's blanket ban on in-person solicitation for profit), and *The Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995) (upholding state's 30-day ban on targeted mail solicitation of accident victims) – significantly reined in lawyer advertising and solicitation.

As we all know from our daily lives, advertising and targeted solicitation has proliferated exponentially in the three decades since *Bates*. Many lawyers are revolted by some lawyer ads, but the states have had little power to prohibit any claims or statements that are not false, deceptive, or misleading.

### **Upset in Upstate**

Upstate New York, especially Western New York, was a hotbed of billboards and television ads for personal injury lawyers. (I have heard but cannot verify that Western New York had the highest expenditure of lawyer advertising dollars per capita in the country.) Some ads were over the top – just enter the name Jim "The Hammer" Shapiro into Google or You Tube and click on a few of his ads. Other ads, such as those for Cellino & Barnes, were billboards that simply had the pictures of the two name partners and the words "Injured? Cellino & Barnes 454-2020." These low-key billboards apparently worked well. As one blogger ("Outside Counsel") said: "Cellino & Barnes changed the paradigm for plaintiff's personal injury practices in this end of the state, and in doing so managed to step on quite a few toes, and bend quite a few noses out of joint. They built the largest personal injury firm in New York – a remarkable thing, and they did it two ways: by advertising, and by getting results."

Some of the noses bent out of shape in Western New York belonged to the lawyers in the Monroe County Bar Association, which includes Rochester. The Monroe County Bar responded to the flood of advertising by adopting guidelines to clarify lawyers' responsibilities under the advertising rules, and it also set up a Commission of local lawyers to review legal advertisements (including billboards). If the Commission identified a violation of the advertising rules, it would try to negotiate a resolution with the

offending lawyer. If the offending lawyer would not agree to a resolution, the Commission would notify the bar association and announce publicly that the lawyer was not in compliance. But the Commission was mothballed when people raised antitrust objections (because rules of a voluntary bar association are not “state action”) and suggested that lawyers who were labeled “unethical” might sue the Bar Association for defamation. Also, the Fourth Department supposedly voiced concerns that discipline was the province of the Courts, not the local bar.

Another person who was upset by the ubiquitous lawyer advertising in Western New York was the Hon. Eugene Piggott, Jr., then Presiding Justice of the Fourth Department. He apparently complained about lawyer advertising to Vince Buzard of Harris Beach, and when Buzard became President of the State Bar in June of 2005, one of his first acts was to appoint a special sixteen-member Task Force on Lawyer Advertising, chaired by Bernice Leber of Arent Fox in New York City. A few months later, Buzard’s voice was heard in the following radio advertisement sponsored by the State Bar:

This is Vince Buzard, president of the New York State Bar Association. Do you feel bombarded by lawyer advertising? Here’s some advice. If you need a lawyer, ask another lawyer for a recommendation. Or ask friends, or business associates, or call the State Bar Association for a referral. Attorneys have a constitutional right to advertise, but billboards and the Yellow Pages don’t necessarily provide the information you need. A message from the New York State Bar Association in cooperation with the New York State Broadcasters Association.

Meanwhile, the Courts began studying advertising on their own. In June or July of 2005, Chief Judge Kaye appointed a special six-person committee to study New York’s existing rules on lawyer advertising and to suggest amendments –the same charge given to the State Bar’s Task Force. The State Bar Task Force worked thoroughly and assiduously. It collected and reviewed 300 print and electronic ads, randomly selected from Department Disciplinary Counsel and from TV and the Internet. It provided written analysis of each ad and assessed which of the ads appeared to violate the rules and which appeared to satisfy them. It prepared a 50-state survey of advertising rules and reviewed any recorded cases concerning the rules. The survey was incorporated in the final report of the Task Force.

The Task Force interviewed Disciplinary Counsel in key states in which advertising rules were being contested. It also reviewed 30 years of ethics opinions and cases in all the states. In addition to Bernice Leber, two lawyers at Arent Fox supplied the research, which was reviewed by five subcommittees of the Task Force. The subcommittees considered various aspects of the rules in order to develop the rules and commentary submitted by the Task Force to the House of Delegates.

By October, 2005, the Task Force had published its report (with a massive appendix), recommending numerous changes and additions to the advertising rules. The Task Force then actively reached out to various bar association ethics committees and to the State Bar’s Committee on Standards of Attorney Conduct (“COSAC”), which was comprehensively reviewing the entire New York Code of Professional Responsibility and had proposed its own version of the advertising rules, a version much closer to the ABA Model Rules. Its members also met with each of the Presiding Justices of the four Appellate Division Departments to discuss their recommendations.

In my role as Vice Chair and Chief Reporter for COSAC, I personally participated in several lengthy conference calls with the Task Force, and I helped draft detailed written comments that the Task Force solicited from COSAC. The discussions with the Task Force were sometimes heated – few topics raise more hackles than lawyer advertising – but Bernice Leber listened to every word. The Task Force took all of the comments and criticisms seriously and revised many of its proposals, sometimes significantly, before submitting a final report to the State Bar’s House of Delegates for consideration. At the State Bar’s Annual Meeting in late January of 2006, the House of Delegates held a vigorous debate on the proposed advertising rules (which I attended), and some proposals were further amended based on the debate.

The Task Force story embodies a great recipe for rulemaking, featuring these key ingredients: (a) a diverse core task force from around the State; (b) an intensive theoretical and empirical study; (c) draft proposals circulated to other bar groups with relevant expertise; (d) serious consideration by the task force of all comments and criticisms; (e) a coherent final report with recommendations supported by rational explanations; and (f) a vigorous debate in the State Bar’s House of Delegates, the most diverse and representative body of lawyers in New York. This is how rules ought to be made. But that is not in fact how they ultimately were made. Instead, they were made by the Courts in secret, with scant attention to the thoughtful and carefully crafted recommendations by the State Bar.

### **How the Courts Made the Advertising Rules**

The State Bar sent its recommendations to the Courts at the end of January 2006. The Courts mulled them over but did not formally pursue any dialog with the Task Force on Lawyer Advertising or COSAC. Instead, on June 13, 2006, the Courts circulated extreme anti-advertising proposals for a ninety-day public comment period (meaning that the entire comment period occurred during the summer, when many bar committees do not meet and many lawyers go on vacation). The press release issued by the Courts stated: “Sweeping new restrictions on lawyer advertising *will be enacted* in New York to safeguard consumers from *potentially misleading* advertising and overly aggressive or inappropriate solicitation for legal services.” (Emphasis added.) The press release also announced that the amended rules would take effect on November 1, 2006. This sounded like a done deal, even before the Courts studied the public comments.

Many different bar groups reacted negatively to the June 2006 proposals. The Courts have refused to release any of the “public” comments (why?) but I know from participating in discussions in Nassau County, New York City, and New York State bar groups that lawyers at large and small firms considered many elements of the June proposals to be unworkable, unfair, and unwise. For example, the proposals would have provided that advertisements must not (i) “include an endorsement of, or testimonial ... from a current client”; (ii) “depict the use of a courtroom or courthouse”; or (iii) “include a portrayal of a client by a nonclient ...” The proposed rules did not allow disclaimers to cure a problem. The definition of the term “advertisement” was incredibly broad – it meant “any public communication made by or on behalf of a lawyer or law firm about a lawyer or law firm, or about a lawyer’s or law firm’s services,” a definition broad enough to cover cocktail party conversations, coffee mugs with a firm’s name and logo, and the full range of oral, print, and broadcast communications about a lawyer or firm. And the June 2006 proposals would have required lawyers to file *every* advertisement or solicitation with the attorney disciplinary committee of the appropriate appellate judicial department.

Then a funny thing happened on the way to the forum. Justice Pigott, by all accounts the driving force behind the crackdown on lawyer advertising, was nominated to the New York Court of Appeals. He is a competent and well respected jurist (rational, I'm told, on all issues except lawyer advertising), and his nomination sailed through the confirmation process. He took a seat on the Court of Appeals in September of 2006. In any other state, a judge on the state's highest court would have had more influence on the rules of legal ethics than an intermediate appellate judge, but not in New York. About the time he was confirmed, the Courts announced that the public comment period would be extended to November 15th (an extra sixty days) and that the rules would not take effect until January 15, 2007.

Ultimately, the Courts released the amended rules on January 4, 2007. They were much milder than the draconian June 2006 proposals – for example, the definition of “advertisement” had narrowed considerably, and lawyers could now use paid endorsements or actors in their advertisement as long as that was disclosed. The amended rules took effect less than a month later, on February 1, 2007. On that same day, three plaintiffs filed their complaint in *Alexander v. Cahill*.

### ***Alexander v. Cahill***

The plaintiffs in *Alexander* were the upstate personal injury law firm of Alexander & Catalano, name partner James Alexander, and Public Citizen, Inc., a not-for-profit public interest organization. They raised First Amendment challenges to various advertising rules in DR 2-101(C) and to DR 2-103(G), including these:

c. An advertisement shall not:

1. include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter that is still pending;
3. include the portrayal of a judge, the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case;
5. rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence;
7. utilize a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter.

g. A lawyer or law firm shall not utilize:

1. a pop up or pop under advertisement in connection with computer accessed communications, other than on the lawyer or law firm's own web site or other internet presence; ...

The plaintiffs also challenged the solicitation blackout provision in DR 2-103(G), which provided:

(g) No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

The parties to *Alexander v. Cahill* submitted competing motions for summary judgment, and Judge Scullin held several lengthy oral arguments. On July 23, 2007, he issued an opinion striking down five advertising provisions on First Amendment grounds, but upholding a blanket ban on solicitation in any form within thirty days after an accident or disaster causing personal injury or death. Judge Scullin also entered a permanent injunction against enforcement of the rules he had declared unconstitutional.

The defendants appealed to the Second Circuit, but oddly, oral argument was not held until January 22, 2009, eighteen months after Judge Scullin's decision. The Second Circuit panel was top flight -- it consisted of Judges Sonia Sotomayor, Guido Calabresi, and John Walker. The newspaper account of the oral argument says it all:

Within minutes of the start of the hour-long argument ... all three members of the panel had swept past the state's main argument that the restrictions are outside the reach of free speech protection. Instead, they zeroed in on the issue of whether the restrictions were narrowly tailored to their intended purpose....

Judge Calabresi doubted that "potentially misleading speech" fell beyond First Amendment protection. Judge Sotomayor said that the rules misread the purpose of advertisements, which was "attention grabbing, not informational." Judge Walker asked whether the State Bar's disclaimer approach would have been better suited to meet the "narrowly tailored" requirement. And on it went. Daniel Wise, *Circuit Skeptical Over Restoration of Rules Curbing Content of Ads* (NYLJ, Jan. 23, 2009).

The decision did not come down for a long time -- more than a year after argument. Perhaps the delay was caused by Judge Sotomayor's nomination to the Second Circuit. Or perhaps the Second Circuit wanted to see how the Supreme Court decided another First Amendment case involving lawyer advertising, *Milavetz, Gallop & Milavetz, P. A. v. United States*, 2010 WL 757616, which did not come down until March 8, 2010. (It was not cited by the Second Circuit). Whatever the cause of the delay, the Second Circuit finally spoke on March 12, 2010, nearly fourteen months after oral argument and going on three years after the district court's decision.

### **The Second Circuit's Decision**

The Second Circuit's opinion was written by Judge Calabresi, the former Yale Dean who is one of the most respected judges in the country. (Judge Walker joined in his opinion so it was unnecessary to bring in a third judge to replace Judge Sotomayor.)

The court described some of Alexander & Catalano’s advertisements as follows:

Prior to the adoption of New York’s new attorney advertising rules, the firm’s commercials often contained jingles and special effects, including wisps of smoke and blue electrical currents surrounding the firm’s name. Firm advertisements also featured dramatizations, comical scenes, and special effects—for instance, depicting Alexander and his partner as giants towering above local buildings, running to a client’s house so quickly they appear as blurs, and providing legal assistance to space aliens. Another advertisement depicted a judge in the courtroom and stated that the judge is there “to make sure [the trial] is fair.” The firm’s ads also frequently included the firm’s slogan, “heavy hitters,” and phrases like “think big” and “we’ll give you a big helping hand.”

When the amended rules took effect in 2007, Alexander & Catalano halted these ads.

After finding that these ads were protected by the First Amendment, the Second Circuit tested each challenged advertising provision according to the four-part inquiry announced in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980):

[1] whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

With one exception, the amended rules failed the Central Hudson test. “The speech that Defendants’ content-based restrictions seeks to regulate—that which is irrelevant, unverifiable, and non-informational—is not inherently false, deceptive, or misleading,” Judge Calabresi said. “Defendants’ own press release described its proposed rules as protecting consumers against ‘potentially misleading ads.’ This is insufficient to place these restrictions beyond the scope of First Amendment scrutiny.

The Second Circuit also affirmed the district court’s ruling upholding the constitutionality of the thirty-day ban on all forms of solicitation – including print and broadcast advertisements – after an accident or disaster. Defendants did not submit any statistical or anecdotal evidence of consumer problems with or complaints of the sort they sought to prohibit, and did not specifically identify any studies from other jurisdictions on which the state relied, but Judge Calabresi eschewed a “technology-specific approach” to the First Amendment and concluded that New York’s moratorium provisions survive constitutional scrutiny “notwithstanding their applicability across the technological spectrum.”

In particular, Judge Calabresi noted that *the Supreme Court has recognized “the particular sensitivity of people to targeted (plaintiff’s) attorney advertisements during periods of trauma. Attorney advertisements in all media are directed to “the same sensitive people” – essentially a First Amendment analogue to tort law’s thin-skinned plaintiffs, those who have a “porcelain heart.”* Judge Calabresi said:

Some accident victims and their families might welcome targeted solicitations that inform them of their legal rights immediately after the accident (particularly when insurance companies may already be knocking on their doors). Other accident victims and their families might be perturbed—but not outraged—by the targeted solicitations. The Supreme Court, however,

tailored First Amendment law, in the context of attorney solicitations, to the most sensitive members of the public.

With those porcelain hearts in mind, with an emphasis on the privacy of the home against intrusions by mail, email, newspaper, television, or other media, and with a recognition that offensive solicitations by a few lawyers can damage the reputation of the entire legal profession, Judge Calabresi upheld New York's blanket ban on solicitation by any mode or medium within thirty days after an accident or disaster.

However, the Second Circuit did not affirm the District Court's ruling striking down the language now in Rule 7.1(c) (3), which prohibits "the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case." At oral argument, the Attorney General (representing defendants) suggested that the court construe this language as applying only to situations in which lawyers from different firms give the misleading impression that they are from the same firm (i.e., "The Dream Team"). Thus interpreted, the rule addresses only attorney advertising techniques that are "actually misleading" as to the existence or membership of a firm, and such advertising is not entitled to First Amendment protection.

### **Petition for Certiorari?**

The Second Circuit's opinion may or may not be the final chapter in *Alexander v. Cahill*. A highly interesting question is whether the defendants – the highest ranking disciplinary counsel from around the state, sued in their official capacities – will seek certiorari in the United States Supreme Court. Disciplinary counsel in New York are employees of the Appellate Department in which they work, so the Presiding Justices of the four Appellate Division courts (as opposed to the individual defendants) will largely control the decision. But unlike ordinary clients, governmental defendants who are sued in their official capacities do not have complete power to instruct their lawyers to appeal. Rather, the decision is likely to be made cooperatively between the New York Attorney General (Andrew Cuomo) and the Courts, where power is held jointly between the Presiding Justices of the Appellate Divisions and the Chief Judge and Chief Administrative Judge of the State (Jonathan Lippman and Anne Pfau).

In my view, those who are hostile to lawyer advertising have nothing to lose by seeking certiorari. The worst that can happen is an affirmance of the Second Circuit. The best that can happen for those who detest lawyer advertising is that the Supreme Court would re-examine *Bates v. State Bar of Arizona* (1977) and the long line of cases since then that have extended a degree of First Amendment protection to lawyer advertising. The current Court might then roll back the clock to the days when every state imposed a blanket ban on the kinds of advertising we see now on a daily basis.

Because the deliberations about whether to seek certiorari will be held behind closed doors at the highest levels of New York's executive and judicial branches, we may not know the decision until shortly before the deadline for filing a cert petition. (I doubt that the plaintiffs will seek to overturn the Second Circuit's decision – they will not want to give the current Supreme Court a chance to annul more than three decades of First Amendment jurisprudence allowing lawyers to advertise.)

Because the rules struck down by the Circuit Court are now codified in Rule 7.1 of the Rules of Professional Conduct adopted by the Appellate Divisions in April 2009, a decision not to seek certiorari

(or an unsuccessful petition) would require the Courts to revise or abandon the unconstitutional provisions of Rule 7.1 as directed by the Second Circuit in *Alexander*. As Judge Calabresi said, the court was returning the matter to the Appellate Division, where that body may “take a ‘second look’ with the eyes of the people on it.”

### **Conclusion: Let’s Improve the Relationship between the Bar and the Courts**

The greatest concern to me in reflecting on the import of *Alexander v. Cahill* is the lack of trust and confidence that the Courts have shown toward the New York State Bar Association during the rulemaking process. This is a great loss. Just as a relationship of trust and confidence is essential to a productive attorney-client relationship, so I believe that a relationship of trust and confidence is essential to a productive relationship between the State Bar and the Courts. The Courts lack the resources, the experience, the diversity (geographic and otherwise), and the time necessary to write fair, wise, and workable rules of professional conduct. Courts are excellent at writing opinions addressed to the particular facts before them, but they are not legislatures and have difficulty writing broad statute-like rules. They need the help of the State Bar and its 70,000 members from every corner of the State and every type of practice if they want to produce rules that attorneys respect and understand. By disrespecting the judgment of the State Bar regarding the advertising rules (not to mention their disdain for the COSAC proposals) and by disregarding the value of literally thousands of hours that the Task Force on Lawyer Advertising (and COSAC) spent developing, debating, and revising proposed rules, the Courts have damaged their relationship with an indispensable and irreplaceable resource. Some people who will no longer contribute their time and effort to rulemaking because they believe the Appellate Divisions ultimately will not listen. That is a shame for all New Yorkers.

It is also an embarrassment to New York lawyers that the judges in charge of approving the rules have ignored the United States Constitution, the most sacred document in our land and the bedrock of our democracy. In holding that the advertising provisions written by the Courts violated the First Amendment, Judge Calabresi repeatedly cited the report and recommendations of the State Bar’s Task Force on Lawyer Advertising as evidence that the State’s interest was not sufficiently strong and that more narrowly tailored measures were available to address the various interests Bar’s proposals would have passed muster under the First Amendment. The Courts’ rules did not.

I hope that next time the State Bar presents a thoughtful set of proposals after extensive discussion and debate, the Presiding Justices of the Appellate Divisions will recognize the value of the State Bar’s enormous volunteer effort and will approve the proposals, or that the judges will at least initiate a meaningful dialog with the State Bar about the proposals rather than cloistering themselves behind closed doors. Speaking strictly for myself as an individual who loves lawyers, the legal profession, and the rule of law, all New Yorkers would benefit from a better relationship between the State Bar and the Courts when we write the rules that regulate lawyers. Let’s begin now. We have a lot of work to do.

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